Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

ST. JUDE MEDICAL, INC.,
PACESETTER, INC., AND VENTRITEX, INC.,
Petitioners,

v.

CARDIAC PACEMAKERS, INC.,
GUIDANT SALES CORPORATION, ELI LILLY AND COMPANY,
AND ANNA MIROWSKI,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), this Court held that the district courts have inherent authority to order a new trial upon finding that fraud has been committed upon them. The district court in this case ordered a new trial upon finding that respondents committed a fraud on the court by knowingly presenting an expert witness who deliberately lied before, during, and after trial in order to conceal from the jury material evidence that contravened the verdict and deprived petitioners of the right to a fair trial. The court of appeals did not disturb any of the district court's findings of prejudicial misconduct, including its finding that the fraud had "irretrievably tainted" the jury's verdict, but nonetheless "reinstated" that verdict. The question presented is:

Did the court of appeals err in concluding—in square conflict with the decisions of every other court of appeals—that the district court lacked the discretionary authority to order a new trial as a sanction and remedy for the fraud perpetrated by respondents' witness and counsel?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all of the parties to the proceeding in the court below.

Pursuant to this Court's Rule 29.6, petitioners state that Ventritex, Inc. was merged with and into Pacesetter, Inc. in 1997, and that Pacesetter, Inc. is a wholly owned subsidiary of St. Jude Medical, Inc. St. Jude Medical, Inc. is a publicly traded company. No publicly held company owns 10 percent or more of its shares.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners St. Jude Medical, Inc., Pacesetter, Inc., and Ventritex, Inc. (collectively, "St. Jude") respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a), is reported at 381 F.3d 1371. The opinion of the district court (App., *infra*, 27a-180a) is not officially reported, but is available at 2002 U.S. Dist. LEXIS 14767 and 2002 WL 1801525.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2004. A timely petition for rehearing was denied on November 2, 2004. App., *infra*, 181a. On January 14, 2005, the Chief Justice extended the time within which to file a petition for certiorari to and including March 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

St. Jude was accused by respondents Cardiac Pacemakers, Inc. *et al.* ("CPI") of infringing U.S. Patent No. 4,407,288 ("the '288 patent"). Among other defenses, St. Jude asserted that the patent was invalid because the claimed invention was "obvious" in light of the prior art. The jury returned a verdict finding the '288 patent valid and rejecting St. Jude's obviousness defense.

Evidence discovered after trial showed that CPI's principal expert witness had deliberately lied under oath before, during, and after trial in order to conceal evidence that was material to the obviousness inquiry, and that CPI and its lawyers had been complicit in his perjury. The district court ordered a new trial on all issues, including obviousness, based on findings that CPI had committed a fraud on the court and

the jury by knowingly presenting perjured testimony that precluded the jury from considering evidence that directly contradicted CPI's theory of non-obviousness and "irretrievably tainted" the jury's validity verdict. App., *infra*, 151a. The court of appeals, without disturbing the district court's factual findings of fraud and prejudice, "reinstate[d]" the jury's tainted validity verdict. *Id.* at 2a.

1. St. Jude and CPI each manufacture and sell implantable cardiac defibrillators ("ICDs"), which are medical devices that can be implanted in a patient's body to monitor heart rhythms and, if necessary, to administer electrical stimulation to correct abnormal rhythms. App., *infra*, 2a-3a. The devices "can sense dangerous cardiac arrhythmias and can administer electrical therapy immediately, first with mild 'pacing' shocks and, if necessary, with powerful defibrillating shocks that can save the life of a patient" experiencing a heart attack. *Id.* at 28a. ICDs are powerful and sophisticated devices that have saved thousands of lives. Indeed, the federal Medicare program has recently expanded the coverage available to patients who would be helped by ICDs. Janet Moore, *Medicare Expands Patient Defibrillator Coverage*, MINNEAPOLIS STAR-TRIB., Jan. 28, 2005, at 1D (Medicare's decision "will expand the number of Medicare patients eligible for an ICD by 500,000. [The Centers for Medicare and Medicaid Services] expect[] the decision to save 2,500 lives in the first year of coverage.").

CPI sued St. Jude for allegedly infringing four patents that claimed various "improvements" to the basic ICD device, the original ICD patent having expired long before this lawsuit was filed. *See* 28 U.S.C. § 1331 (providing federal question jurisdiction). One of the patents asserted by CPI was invalidated by the district court prior to trial in a decision that was affirmed by the Federal Circuit. *Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc.*, 296 F.3d 1106 (Fed. Cir. 2002). Another was abandoned by CPI before trial. A third was invalidated by the district court after trial, and CPI did not appeal from that decision. App., *infra*, 3a-4a. The fourth, and final, patent in issue is the '288 patent.

The '288 patent claims an ICD that can be programmed for "multimode" operation, meaning that the device can respond to an arrhythmia with one type of electrical therapy and then, if the first therapy is not successful, can proceed automatically to administer other types of electrical therapy, including "cardioversion." Cardioversion is a method of correcting a heart arrhythmia by applying "non-pacing electrical pulses" that are designed to jolt the heart back into proper functioning. App., *infra*, 102a.

2. At trial, St. Jude maintained that the '288 patent was invalid because (among other reasons) the claimed "improvement"—*i.e.*, multimode operation including cardioversion—would have been obvious to a person skilled in the art when the patent application was filed. *See* 35 U.S.C. § 103(a) (invention unpatentable if it would have been obvious to a person skilled in the field in light of prior art). Dr. Richard Mihran, St. Jude's expert, testified that several previous patents and other references, read in combination, taught multimode operation, cardioversion, and an incentive to combine the two. App., *infra*, 105a. Dr. William Tacker, CPI's expert, testified that none of these references taught all of the elements of the asserted claim and, further, that none provided motivation to combine their respective teachings. *Id.* at 103a-104a.

Before trial, CPI introduced additional expert testimony on obviousness from Dr. Joe Bourland, who prepared an expert report addressing the prior art and testified on obviousness in his pretrial deposition. *See* App., *infra*, 122a ("In pretrial reports and in the briefing on motions for summary judgment, Dr. Bourland also considered and addressed issues of validity, including obviousness . . ."). Also in his pretrial deposition, Dr. Bourland testified that he had been "involved" in "some litigation" involving Medtronic—another leading maker of ICDs—but that he had not given a deposition or provided an expert report in that litigation. *Id.* at 122-123a.

Dr. Bourland was designated as a validity expert at trial, and "St. Jude was expecting Dr. Bourland to testify on issues

of validity as well as issues of infringement." App., *infra*, 135a. But CPI abruptly changed course; at the end of Dr. Bourland's first day of testimony, CPI announced "for the first time that Dr. Bourland would not be addressing validity issues." *Ibid.*; *see also id.* at 122a ("At trial, . . . CPI chose not to ask [Dr. Bourland] about obviousness issues"). Instead, he "testified as CPI's principal infringement witness." *Id.* at 121a. CPI presented Dr. Bourland to the jury as a dispassionate academic who was not a professional expert witness. Indeed, in response to a question from CPI's lawyers, Dr. Bourland testified that he had served as an expert witness just "[o]ne time many, many, years ago, but it was not a patent infringement suit." App., *infra*, 125a-126a.

CPI elected not to have Dr. Bourland testify on obviousness at trial because, contrary to his sworn testimony, Dr. Bourland had in fact been retained as an expert in the Medtronic patent litigation (captioned *Moore v. Medtronic*), which was still pending at the time of his testimony; he had in fact prepared an expert report in that case; and—unbeknownst to St. Jude, the court, or the jury—Dr. Bourland's *Moore* report in fact directly contradicted the theory of non-obviousness advanced by CPI at trial. App., *infra*, 122a, 133a-134a. In particular, Dr. Bourland's *Moore* report addressed the same prior art, particularly regarding "cardioversion," in a manner that was materially different from the opinions presented by CPI (through Dr. Tacker) at trial, and that conflicted with the opinions that Dr. Bourland himself had advanced before trial in this case. *See id.* at 134a.

Unknown to St. Jude, counsel in the *Moore* case happened to be in the gallery during Dr. Bourland's trial testimony in the St. Jude case and provided a copy of Dr. Bourland's *Moore* report to counsel for St. Jude after hearing his testimony that he had not previously served as an expert in a patent case. App., *infra*, 126a. When confronted with this report on cross-examination, Dr. Bourland explained that he had simply "misunderstood" the questions about his previous expert service. *Ibid.* Having no reason to believe at that time that Dr. Bourland had done anything other than commit an

innocent mistake, or that CPI's attorneys had knowingly facilitated a deception, the district court did not take immediate steps to sanction Dr. Bourland or CPI. Instead, the district court simply advised the jury that "[t]he report Dr. Bourland prepared in [the *Moore*] case should have been disclosed . . . to the defendants in this case well before trial" and—at the request of CPI's counsel—told the jury that "[t]here is . . . no indication that CPI's counsel had the report before trial." *Id.* at 144a.

3. The jury returned a special verdict rejecting St. Jude's obviousness defense and finding the '288 patent to be valid. App., *infra*, 29a. The jury also found that St. Jude had not infringed the patent. *Ibid.*

Following the verdict, St. Jude sought and was granted permission to conduct additional discovery into Dr. Bourland's testimony about the *Moore* case. App., *infra*, 128a-129a. Dr. Bourland filed a post-trial affidavit reiterating his explanation that he had simply "misunderstood" the questions that he had been asked on direct examination. *Id.* at 129a. One week later, however, at a post-trial deposition ordered by the district court, Dr. Bourland admitted that he had not simply "misunderstood" the questions that were asked of him; to the contrary, he confessed that he had knowingly and deliberately lied to conceal his *Moore* report from the jury. *Id.* at 122a, 129a-130a. St. Jude also learned that CPI had a copy of Dr. Bourland's *Moore* report for months before the trial and that CPI also had retained Dr. Bourland in a separate suit involving Dr. Moore—none of which had been disclosed before or during trial.

Upon learning that Dr. Bourland had deliberately perjured himself with the complicity of CPI and its counsel, St. Jude immediately moved for sanctions against CPI. The district court found that "Dr. Bourland was the single most important witness for [CPI]," and that his "sworn testimony before, during, and after trial was deliberately false." App., *infra*, 121a, 122a; *see also id.* at 124a-125a ("Dr. Bourland made a deliberate decision during his pretrial deposition in this case to lie rather than disclose the truth about his work in

Moore v. Medtronic"). Although CPI continued to attribute Dr. Bourland's concealment to mere "forgetfulness," the district court found that "Dr. Bourland did not merely forget the *Moore* case or the report when he testified on direct"; rather, "[h]e made a deliberate decision not to answer truthfully" and "*admitted* [in his post-trial deposition] that he had in fact intended to conceal both the report and his work in the *Moore* case." *Id.* at 128a, 129a-130a (emphasis added).

The district court recognized that the *Moore* report "casts a different light on the obviousness issue" by offering "conclusions [that] flatly contradict CPI's approach to the same patents in this case," and thus "offered an extensive basis for impeaching [Dr. Bourland's] testimony." App., *infra*, 131a, 132a, 134a. By withholding the *Moore* report, the district court found, CPI "helped enhance Dr. Bourland's credibility before the jury" because jurors would not "have given Dr. Bourland any credit at all if they had known that he . . . made a deliberate decision to conceal what he had done in the *Moore* case." *Id.* at 130a, 145a. The district court observed that "[t]he jury was entitled to know not only that Dr. Bourland had contradicted himself on several matters at the core of this case," including obviousness, "but also that he had deliberately lied in such a way as to prevent the disclosure of those contradictions," because "for most jurors who must evaluate the credibility of witnesses, the differences between forgetfulness and deliberate deception is a wide chasm." *Id.* at 145a.

As the district court concluded: "Dr. Bourland deceived the jury, deceived the court, and deceived St. Jude. He did so deliberately, and he did so on matters that go to the heart of the case and to the heart of his credibility." App., *infra*, 136a.

The district court also determined that CPI and its attorneys were complicit in Dr. Bourland's fraud. App., *infra*, 137a-139a. The district court found that "CPI knew at the time of Dr. Bourland's trial testimony that it was false," and that "[o]nce the problem came to light, [CPI and its attorneys] did not promptly share with the court or St. Jude their

knowledge about this troubling situation"; "[i]nstead, they spent much more time worrying about 'damage control' than about actually clearing up the situation for the court." *Id.* at 139a, 142a, 149a. Indeed, the district court found that CPI's General Counsel, an officer of CPI, had received a copy of the *Moore* report months before trial and, although present in court, said nothing when the district court instructed the jury that "there was no indication that CPI's counsel had the [*Moore*] report before trial." *Id.* at 140a. CPI's General Counsel, the district court observed, "allowed the court to give the jury what [he] should have realized was a false impression that tended to minimize the responsibility of CPI and its attorneys." *Id.* at 140a.

Turning to the appropriate sanction, the district court recognized that "[a] key witness's perjury or deliberately false testimony on a material matter provides sufficient grounds for a new trial if the district court believes, as this one does, that the result was the denial of a fair trial." App., *infra*, 150a-151a. The district court found that Dr. Bourland's and CPI's deception had "irretrievably tainted" the verdicts and "seriously undermined" the "fairness and integrity of the proceedings." *Id.* at 151a, 152a. The district court considered striking the entirety of Dr. Bourland's testimony and entering judgment against CPI with prejudice. *Id.* at 149a. Although the court concluded that this litigation-ending remedy was "not outside the bounds of reasonable sanctions in this case," it ultimately decided to adopt a more limited response. *Ibid.*

Invoking its inherent power to "vacate its own judgment upon proof that a fraud has been perpetrated upon the court" (*id.* at 151a-152a (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944))), the district court con-

cluded that "St. Jude is entitled to a new trial untainted by Dr. Bourland's deception." *Id.* at 153a.[1]

4. The court of appeals vacated the new trial order and "reinstated" the jury's verdict on the obviousness defense that St. Jude had presented at trial. CPI did not challenge, and the court of appeals did not disturb, the district court's findings that Dr. Bourland and CPI had committed a fraud on the court; that the fraud had compromised the integrity of the district court proceedings and had deprived St. Jude of its right to a fair trial; or that the concealed evidence was material to the obviousness defense and directly contradicted the position taken by CPI at trial. Nevertheless, the court of appeals concluded that the district court had "exceeded [its] discretionary authority" in ordering a new trial. App., *infra*, 13a. The court of appeals opined that a new trial is appropriate *only* where the verdict is "against the manifest weight of the evidence," or where the proceedings are subject to a procedural error such as an "incorrect instruction of law." *Ibid.* Concluding that there was no procedural or evidentiary error, the court of appeals vacated the new trial order without directly addressing the misconduct perpetrated by CPI at trial.

St. Jude petitioned for rehearing on the ground that the undisputed fraud committed by CPI on the district court pro-

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[1] The district court also granted judgment as a matter of law in favor of St. Jude on its obviousness defense, reasoning that no reasonable jury could have concluded on the trial record that the prior art did not teach multimode therapy with cardioversion. App., *infra*, 113a. The district court ruled in the alternative that "in the event that this court's final judgment in favor of [St. Jude] were to be set aside on appeal, ... St. Jude would be entitled to a new trial on all issues as to which it did not prevail" as a "remedy for Dr. Bourland's deception." App., *infra*, 120a-121a; *see also id.* at 153a ("if any claim by CPI that was tried to the jury survives an appeal, Dr. Bourland's deception entitles St. Jude to a new trial").

vided a basis for the new trial order independent of the evidentiary issues addressed by the court of appeals. In response, CPI conceded that "[w]hile the [Federal Circuit's] opinion does not expressly address St. Jude's arguments [relating to Dr. Bourland and the new trial order], the [c]ourt *must* have considered and properly denied them." Answer to Pet. for Reh'g (Oct. 4, 2004), at 3 (emphasis added).

REASONS FOR GRANTING THE PETITION

The decision below marks the first time in the history of the Republic that a federal appellate court has held that a federal district court lacks the discretionary authority to order a new trial as a remedy and sanction for prejudicial misconduct committed by a litigant's witness and attorneys. Never before has a court of appeals held that a district judge cannot police his own courtroom by ordering a new trial as a sanction against a party for perpetrating a fraud on the court. Nor has a court of appeals ever before held that a verdict obtained by fraud can be sustained in the face of a district court order overturning it on the basis of prejudicial misconduct. And never before has a court of appeals ordered a verdict "reinstated" where the record unequivocally shows that the verdict was obtained through the knowing use of perjured testimony designed to conceal material evidence that directly contravenes the verdict.

The decision below is not just unprecedented; it directly and irreconcilably conflicts with an extensive and heretofore unbroken line of authority from this Court and the other courts of appeals. This Court has long recognized the inherent discretionary authority of district courts to sanction and remedy litigation abuses. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). As explained below, the courts of appeals have repeatedly, consistently, and steadfastly sustained the exercise of this authority by district courts in circumstances analogous to those presented in this case. Time and again, when district courts have ordered new trials on the basis of misconduct by parties, their lawyers, or their witnesses, the courts of appeals have unfailingly sustained such orders as appropriate exercises of judicial discre-

tion. The decision below squarely and unaccountably conflicts with these authorities.

The Federal Circuit's decision to "reinstate" a corrupted jury verdict would, if left uncorrected, produce an outrageous miscarriage of justice. The record of deception and misconduct in this case is breathtaking. With the complicity of counsel, a party's principal expert set out deliberately to deceive the court and the jury by concealing facts material to the dispute. The district court determined that it had "no doubt" (App., *infra*, 150a, 164a-165a) that the fraud had in fact undermined the integrity of the proceedings and deprived St. Jude of its right to a fair trial. Yet the Federal Circuit, without reversing the district court findings that prejudicial fraud had been committed, ordered that the verdict entered by the tainted jury be "reinstated," and thus subjected St. Jude to a judgment indisputably infected by fraud. That decision so far departs from the ordinary course of federal litigation as to warrant the exercise of this Court's supervisory authority.

Review in this case is warranted to vindicate the power of district courts to combat intentional and deliberate schemes to practice deception, conceal evidence, and otherwise distort the workings of the adversarial system. The judiciary simply cannot ensure fair and impartial proceedings if expert witnesses can lie with impunity, or if parties and their lawyers face no consequences for knowingly participating in such corruption. Conspiracies to tamper with the administration of justice can be deterred only by ensuring that district courts have ample authority to swiftly, surely, and finally vacate judgments that are procured by fraud. This is the central teaching of *Hazel-Atlas*; but it was disregarded by the Federal Circuit in this case.

Review is also particularly appropriate in this case because it involves the public rights embodied in a patent. This Court has repeatedly emphasized the important public interests at stake in the patent process and the critical need for patent decisions to be unsullied by dishonesty and deceit. Fraud and prevarication in patent litigation work an injury not only on the litigants themselves, but on the multitude of

academics, researchers, inventors, manufacturers, and other stakeholders in the patent process whose research and development decisions may be profoundly altered by judicial rulings upholding patents and by the effective monopoly the patent system provides to a patent-holder and its licensee. Deploying fraud to extend a patent beyond its legitimate scope—the offense at the heart of this case—is precisely the type of evil that a district court has inherent sanctioning power to prevent. Again, *Hazel-Atlas* so held; but this holding was unaccountably yet undeniably disregarded by the Federal Circuit.

The petition for a writ of certiorari should be granted.

I. The Decision Below Conflicts With Numerous Decisions Of This Court And The Courts Of Appeals

This Court has long held that federal courts possess the inherent power to sanction litigants for engaging in fraud or other misconduct during litigation. This power is "'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)).

"[T]he inherent power extends to a full range of litigation abuses." *Chambers*, 501 U.S. at 46. While "[t]he most prominent of these [inherent powers] is the contempt sanction" (*Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)), "[c]ourts traditionally have broad authority through means other than contempt—such as by striking pleadings, assessing costs, excluding evidence, and entering default judgment—to penalize a party's failure to comply with the rules of conduct governing the litigation process." *International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 833 (1994); *Roadway Express*, 447 U.S. at 755; *Chambers*, 501 U.S. at 43-45. In particular, the district courts have nearly absolute discretionary authority to order a

new trial as a sanction and remedy for misconduct such as fraud.[2]

1. This Court's seminal decision in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), firmly established that courts, as part of their inherent authority, retain the "historic power of equity to set aside fraudulently begotten judgments." *Id.* at 245. In *Hazel-Atlas* (which bears a stunning resemblance to the events in this case), a party had submitted fraudulent material to the Patent Office and relied upon that material in defending the patent in subsequent litigation. Long after the patent had issued and its validity had been upheld by the courts, the fraud was unearthed, and the accused infringer sought to have the judgment affirming the patent's validity vacated. This Court granted the requested relief and vacated the judgment. The Court recognized that an ancient rule of equity, "firmly established in English practice long before the foundation of our Republic," authorized relief to be granted against judgments procured by fraud, and that such relief could take "several forms," including "setting aside the judgment to permit a new trial," or "altering the terms of the judgment." *Ibid.*

This Court's cases have also made clear that near-absolute deference is owed to a district court's determination to order a new trial as a sanction for misconduct such as fraud. *See Arizona v. Washington*, 434 U.S. 497 (1978) (holding that a trial court's decision to declare a mistrial due to counsel misconduct should rarely, if ever, be reversed);

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[2] The federal rules also vest district courts with the power to order new trials and to alter or amend judgments that have been tainted by fraud. *See, e.g.*, FED. R. CIV. P. 59, 60(b). As this Court has held (*see Chambers*, 501 U.S. at 43), these rules in no way "limit the power of the court, when fraud has been perpetrated on it, to give relief." FED. R. CIV. P. 60(b), Advisory Committee Note, cmt. to 1946 amendment (citing *Hazel-Atlas*).

Gori v. United States, 367 U.S. 364, 366, 368 (1961) (district courts have broad discretion to order mistrials as they are best situated to ascertain the remedies necessary to avoid the "prejudice arising from nuances in the heated atmosphere of the trial," which are not reflected in "the cold record on appeal"). District courts have superior competence to assess the harm that fraud or misconduct has inflicted on the integrity of the trial court proceedings. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 438 (1996) (when, as here, a new trial determination is based on evaluating an event in the context of all the evidence, trial judges, who have "the unique opportunity to consider the evidence in a living courtroom context" are better situated than appellate courts).

In light of the district judge's heightened ability to watch over proceedings in his own courtroom, this Court has observed that "the overriding interest in the evenhanded administration of justice requires that we accord the *highest degree of respect* to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by" misconduct. *Gasperini*, 518 U.S. at 511 (emphasis added); *see also Foster v. Gilliam*, 515 U.S. 1301, 1303 (1995) (Rehnquist, C.J., on application for stay) (a "trial court's judgment is entitled to great deference, *never more so* than when the judgment about the necessity is based on an evaluation of such factors as . . . any prejudice caused by the introduction of such evidence, and the trial court's familiarity with the jurors"); *Gila Valley, Globe, & N. Ry. Co. v. Hall*, 232 U.S. 94, 105 (1914) ("if it appears that the verdict is tainted with prejudice or passion . . . a new trial should be granted, yet the trial court is in a better position to determine this than the appellate court, so that its determination should ordinarily be accepted"). Imposing a "stringent standard of appellate review" of such orders "would seriously impede the trial judge in the proper performance of his 'duty . . . to protect the integrity of the trial.'" *Arizona*, 434 U.S. at 513; *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (with regard to sanctions, "[d]eference to the determination of courts on the front lines of litigation will

enhance these courts' ability to control the litigants before them").

Indeed, the proper exercise of the inherent sanctioning power does not even depend on a finding that the misconduct necessarily affected the outcome of the proceedings. A district court has broad authority to order a new trial because the sanction is necessary to safeguard the integrity of the proceedings. As *Hazel-Atlas* explains, "tampering with the administration of justice . . . involves far more than an injury to a single litigant," and instead constitutes "a wrong against the institutions set up to protect and safeguard the public [which] cannot complacently be tolerated consistently with the good order of society." 322 U.S. at 246; *see also Chambers*, 501 U.S. at 46 (fraud on the court "transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself [and to] 'vindicat[e] judicial authority'"); *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521-22 (1931) (a litigant who engages in misconduct "will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted on his opponent").

2. The decision below clearly and unmistakably conflicts with *Hazel-Atlas* and the otherwise unbroken line of authority in the courts of appeals holding that a district court has authority to order a new trial as a sanction for fraud on the court.

The district court invoked its inherent authority under *Hazel-Atlas* to order a new trial as a sanction and remedy for the fraud practiced by CPI on the court, the jury, and St. Jude. The court painstakingly detailed the evidence supporting that order in an opinion that spanned 42 pages in typescript and 35 pages in the printed appendix. *See* App., *infra*, 120a-154a. The court made extensive findings regarding the knowing and deliberate nature of Dr. Bourland's repeated falsehoods; the complicity of CPI and its counsel in the fraud; the prejudice to St. Jude; and the "irretrievable taint" that this sordid conduct imparted on the jury's verdict. *Id.* at 122a, 124a-125a, 128a, 129a-130a, 151a. Convinced that

CPI's misconduct had resulted in "the denial of a fair trial" (*id.* at 151a) and "seriously undermined the fairness and integrity of the proceedings" (*id.* at 153a), the district court ordered a "new trial untainted by Dr. Bourland's deception." *Ibid.*; *see* n.1, *supra*.

In sharp contrast to the district court's meticulous marshaling of the evidence, the Federal Circuit's opinion contains scant reference to Dr. Bourland or the enormity of his misconduct. The court noted that the district court had "granted St. Jude's motion for sanctions based on witness misconduct" (App., *infra*, 4a), and that Dr. Bourland had "concealed contradictory testimony that he had given in a related case" (*id.* at 20a). When the Federal Circuit addressed the district court's new trial order, however, it said only that the jury's verdict on the issue of obviousness was "not against the manifest weight of the evidence"; that "there was no issue of prejudicial procedural error or incorrect instruction of law"; and that "[i]n these circumstances the conditional grant of a new trial exceeded the court's discretionary authority, and is vacated." *Id.* at 13a.

The Federal Circuit's opinion can be read in two ways. Either way, the decision below is nothing short of a radical departure from *Hazel-Atlas* and its progeny.

a. One possibility is that the court of appeals accepted all of the district court's findings of prejudicial misconduct—which would not be surprising, given that CPI did not challenge any of those findings on appeal—yet concluded that the district court lacked the discretionary authority to order a new trial even in light of those findings. Under this reading of the decision, the Federal Circuit's conclusion that the district court "exceeded [its] discretionary authority" in ordering a new trial (App., *infra*, 13a) conflicts not only with *Hazel-Atlas* but with the decisions of literally *every* other circuit.

In the half-century since *Hazel-Atlas* was decided, the courts of appeals uniformly and repeatedly have recognized that district courts have the inherent discretionary power to order a new trial when a party's or witness's fraud or mis-

conduct has compromised the integrity of district court proceedings.[3] Few propositions of law have wider acceptance in

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[3] In Circuit order: *Pearson v. First NH Mortgage Corp.*, 200 F.3d 30, 42 (1st Cir. 1999) (holding that courts have inherent power to remedy fraud on the court and that such remedies are "not necessarily limited to harm caused litigants" but instead are designed to preserve institutional integrity and "with a view to [their] deterrent effect"); *Leber-Krebs, Inc. v. Capitol Records*, 779 F.2d 895, 900 (2d Cir. 1985) (district courts have "flexibility" to exercise their inherent power to craft remedies, including new trials, for fraud on the court); *Virgin Islands Hous. Auth. v. David*, 823 F.2d 764, 766-67 (3d Cir. 1987) (courts have inherent authority to remedy misrepresentations to the court "whether caused by fraud or by a callous disregard" for the facts); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993) ("a judgment obtained by fraud may be vacated under a court's inherent power"); *Fierro v. Johnson*, 197 F.3d 147, 152 (5th Cir. 1999) ("[c]ourts possess the inherent power 'to vacate [their] own judgments upon proof that a fraud has been perpetrated upon the court'"); *Davis v. Jellico Community Hosp. Co.*, 912 F.2d 129, 134 (6th Cir. 1990) (district court has discretion to order a new trial when it is "reasonably well satisfied that the testimony given by a material witness is false"); *Oliver v. Gramley*, 200 F.3d 465, 466 (7th Cir. 1999) (a district court has inherent authority to dismiss a civil action with prejudice when fraud has occurred on the court, as well as "lesser sanctions" such as a new trial); *Conerly v. Flower*, 410 F.2d 941, 945 (8th Cir. 1969) (it is almost always "within the discretion of the trial court to grant a new trial" in such circumstances); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9th Cir. 1995) (same); *United States v. Buck*, 281 F.3d 1336, 1341-42 (10th Cir. 2002) (recognizing a district court's inherent power to set aside a verdict when there has been fraud on the court); *Harre v. A.H. Robins Co., Inc.*, 750 F.2d 1501, 1503 (11th Cir. 1985) (new trial required when "a material expert witness testified falsely on the ultimate issue in the case, where the defense attorneys

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the federal system. *See, e.g.*, 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2805, 2860 (2004); 12 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE 3d § 59.13[2][c][iii] (2004). The Federal Circuit's conclusion that the district court lacked "discretionary authority" to order a new trial in response to fraud repudiates 50 years of accepted federal practice.

b. The other possibility is that the Federal Circuit *sub silentio* disagreed with the district court's findings that Dr. Bourland's misconduct prejudiced St. Jude—either because Dr. Bourland did not testify on obviousness at trial, or because St. Jude was able to make limited use of the *Moore* report at trial—and on that basis concluded that the district court had abused its discretion in exercising the authority to grant a new trial.

To begin with, it is of no moment, as CPI might suggest, that Dr. Bourland did not testify affirmatively on obviousness at the trial. He was offered as an expert on this subject; he prepared a report and was deposed on it; and he was designated as a trial witness on validity. After the *Moore* report was brought to St. Jude's attention by a spectator at trial, CPI abruptly chose not to present Dr. Bourland's validity testimony at trial precisely because his opinions on that subject, as presented in his own pretrial report in this case, were contradicted by the *Moore* report. St. Jude had a right to cross-examine him with the *Moore* report to show Dr. Bourland's

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knew or should have known of the falsity of the testimony"), *modified on other grounds on reh'g*, 866 F.2d 1303 (1989); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971) (courts have the inherent authority to grant new trials "whenever the integrity of the judicial process or functioning has been undercut—certainly in any instance of misconduct by a party").

own lack of credibility as well as the fact that CPI's validity theory (as espoused at trial by Dr. Tacker) was contradicted by Dr. Bourland's opinions in *Moore* but, as explained below, was not able to exercise that right effectively. The district court acknowledged that such a cross-examination would have been devastating to CPI's case, but was foreclosed by the simple fact of the concealment. App., *infra*, 134a. The jury could well have concluded not only that Dr. Bourland was a liar (as he clearly was), but also that CPI's entire case should fail because of its knowing presentation of such lies and the material inconsistencies they were designed to conceal. *See id.* at 145a-146a. The jury, however, learned none of this—to the contrary, it believed (incorrectly) that CPI and Dr. Bourland were innocent.

In any event, under this reading of the decision, the Federal Circuit entered into an equally stark conflict with this Court's decisions and the decisions of other courts of appeals—which, contrary to the decision below, recognize that appellate courts lack the institutional competence to second-guess a district court order granting a new trial to remedy misconduct that undermines the integrity of court proceedings. *See, e.g.*, *Borras v. Sea-Land Serv., Inc.*, 586 F.2d 881, 886-87 (1st Cir. 1978) (review "extremely limited"); *Payton v. Abbott Labs.*, 780 F.2d 147, 152-53 (1st Cir. 1985) (such orders are "virtually unreviewable"); *Meehan v. Gulf Oil Corp.*, 312 F.2d 737, 740 (3d Cir. 1963) (order "granting a new trial is unreviewable" unless ground for order was "merely that the verdict was against the weight of the evidence"); *Massey v. Gulf Oil Corp.*, 508 F.2d 92, 95 (5th Cir. 1975) (substantially less scrutiny when new trial is based on a "pernicious influence"); *Conerly v. Flower*, 410 F.2d 941, 945 (8th Cir. 1969) (it is almost always "within the discretion of the trial court to grant a new trial" in the face of fraud on the court); *Williams v. City of Valdosta*, 689 F.2d 964, 975 (11th Cir. 1982) (much "more hesitant" to review such a ruling); *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984) (when there has been "[a] pernicious or undesirable occurrence at trial," the court of appeals should "affirm" new trial orders); *Taylor v. Washington Terminal Co.*, 409

F.2d 145, 148 n.13 (D.C. Cir. 1969) (in cases of new trials due to "legal error," the "[trial] judge takes over").

CPI might also suggest that the jury was "fully informed" of Dr. Bourland's lies. This is factually untenable, as the district court found: "The jury was entitled to know not only that Dr. Bourland had contradicted himself on several matters at the core of this case, but also that he had deliberately lied in such a way as to prevent the disclosure of those contradictions." App, *infra*, 145a. Only after the verdict was rendered, and the jury discharged, did St. Jude and the court learn that Dr. Bourland had not "forgotten" his work in *Moore*, but rather had made a deliberate decision to lie in an effort to conceal material evidence. And only after the trial did St. Jude and the court learn that CPI's General Counsel had a copy of the *Moore* report in his files all along; at trial, that same General Counsel sat silent at counsel table while the district court instructed the jury (falsely, as it turned out) that CPI was unaware of the report before trial. After the *Moore* report came to light, St. Jude had less than 24 hours in which to prepare a new cross-examination of Dr. Bourland; the district judge, who presided over the trial, found that this simply was not enough time given the complexity of the issues. *Id.* at 134a-135a. Moreover, once the conflicting report surfaced, CPI abruptly determined not to have Dr. Bourland testify at trial on obviousness, and St. Jude was unable to recall Dr. Bourland later in the case because CPI gave St. Jude, and the court, the false impression that Dr. Bourland was out of the country when in fact he had returned to Indiana before the close of evidence. *Id.* at 141a n.41. That is because, as the district court found, "CPI did not want Dr. Bourland to be anywhere near this court or its witness stand for the rest of the trial." *Ibid.*

In any event, the courts of appeals have held that a district court's authority to order a new trial as a sanction for fraud does *not* depend on a showing of prejudice. *See, e.g.*, *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9th Cir 1995) (the inquiry "is not so much in terms of whether the alleged fraud prejudiced the opposing party, but

more in terms of whether the alleged fraud harms the integrity of the judicial process"); *Dixon v. Commissioner of Internal Revenue*, 316 F.3d 1041, 1046 (9th Cir. 2003) ("Prejudice is not an element of fraud on the court. Fraud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced."); *Pearson v. First NH Mortgage Corp.*, 200 F.3d 30, 42 (1st Cir. 1999) (holding that courts have an inherent power to remedy fraud on the court and that such remedies "not necessarily limited to harm caused litigants" but instead are designed to preserve institutional integrity and "with a view to [their] deterrent value"). The district court thus had the authority to order a new trial even if, counterfactually, the magnitude of CPI's misconduct had been fully presented to the jury. The Federal Circuit's contrary decision squarely conflicts with those cases.

Thus, whichever way it is read, the Federal Circuit's decision embraces a legal principle—*viz.*, an unexplained unwillingness to defer to the district court's exercise of its inherent power to order a new trial as a sanction and remedy for adjudicated misconduct—that cannot be reconciled with this Court's cases, and that directly conflicts with numerous decisions of the courts of appeals.[4]

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[4] Leaving all other facts aside, this much is clear: CPI had the *Moore* report before trial, but failed to disclose it to St. Jude. As the district court found, this was a discovery violation that warranted sanctions under Federal Rule of Civil Procedure 37. App., *infra*, 147-148a. The advance disclosure of relevant evidence is designed to prevent unfair surprises such as St. Jude experienced at this trial, and it is well within the discretion of a district court to order a new trial for discovery abuses such as this. *See, e.g.*, *Mar Com Inc. v. F/V Hickory Wind*, 120 Fed. Appx. 74, 75 (9th Cir. 2005) (district courts have an "obligation under Rule 37(c)(1) to grant a new trial" when a party's discovery failure caused unfair sur-

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In view of the square, direct, and undeniable conflict between the decision below and the *Hazel-Atlas* line of authority, the Court may wish to consider summary reversal. *See Pounders v. Watson*, 521 U.S. 982, 991 (1997) (per curiam) (summarily reversing Ninth Circuit's decision addressing the scope of a district court's contempt power). At minimum, plenary review is warranted to resolve the conflict created by the decision below.

II. The Decision Below Threatens The Administration Of Justice And The Integrity Of The Patent System

The result mandated by the Federal Circuit's decision would, if not corrected, produce a clear and entirely unnecessary miscarriage of justice that impugns the integrity of the judicial system in general and the patent system in particular.

The Federal Circuit ordered the validity verdict "reinstated." As the district court determined, however, it is clear that, in the absence of CPI's fraud, the jury would never have returned a verdict sustaining the validity of the patent in the first place. App., *infra*, 132a-134a. Had the jury been fully informed of the *Moore* report (and of CPI's part in its concealment), the jury could easily have reached a verdict of *in*validity. *Id.* at 132a, 146a. If St. Jude does not have the right to retry the same obviousness argument that was presented to the tainted jury, CPI will have successfully perpetrated a fraud on the district court, on St. Jude, and on our system of justice. The Federal Circuit's embrace of this result "so depart[s] from the accepted and usual course of judicial proceedings" as to warrant the exercise of this Court's supervisory power. SUP. CT. R. 10; *see, e.g.*, *McNabb v. United States*, 318 U.S. 332, 340 (1943) ("judicial supervision of the

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prise). The Federal Circuit disagreed, and this conflict alone would warrant review.

administration of . . . justice in the federal courts" imposes a duty to maintain "standards of procedure and evidence").[5]

1. Review in this case would not amount to mere error correction. Few issues are more important to the administration of justice in the federal courts than the proper functioning of the adversarial system. The Federal Circuit's willingness to tolerate and effectively reward corrupt behavior undermines the right of every litigant to a fair trial before an impartial jury, in square conflict with this Court's affirmation that the Seventh Amendment protects this jury trial right in patent cases. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384-87 (1996).[6] St. Jude has been deprived of its fundamental right to have a jury fairly determine the validity

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[5] The fact that St. Jude should be able on remand to present *other* validity defenses, including those based on anticipation or obviousness, does not alter the injustice of "reinstating" a verdict that was directly contradicted by material evidence willfully concealed by the proponent of the patent.

[6] *Accord*, *Brown v. Louisiana*, 447 U.S. 323, 330 (1980) ("The right to jury trial . . . 'is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided'"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 586 (1976) ("So basic to our jurisprudence is the right to a fair trial that it has been called 'the most fundamental of all freedoms.' It is a right essential to the preservation and enjoyment of all other rights."); *Estes v. Texas*, 381 U.S. 532, 540 (1965) ("We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs"); *Zafiro v. United States*, 506 U.S. 534, 540 (1993) ("an important element of a fair trial is that a jury consider *only* relevant and competent evidence").

of the '288 patent, because the Federal Circuit entered judgment on a verdict that was indisputably tainted by fraud.

The Federal Circuit's decision also will have a corrosive effect on public views of the judicial system. Those employed by the parties involved in this case—from the executive suite to the production line—all know that CPI and its attorneys were found to have committed fraud in the patent process and that—under the Federal Circuit's decision—CPI nonetheless might ultimately be permitted to enforce the '288 patent on the basis of that fraud. The case also has received widespread public attention.[7] Left undisturbed, the Federal Circuit's decision, which effectively rewards CPI and its attorneys notwithstanding their deliberate effort to impose a fraud on the court, is "destructive of the public's perception that our system of . . . justice is fair." *Holland v. Illinois*, 493 U.S. 474, 496-97 (1990). This Court has repeatedly made clear that judicial decisions must be measured against a standard "in which the perception as well as the reality of fairness prevails." *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988); *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (same). Review is clearly warranted to ensure that standard is maintained here.

This Court has frequently granted review to address the scope of the judiciary's inherent authority to sanction litigant misconduct and to police the integrity of its proceedings. *See Chambers*, 501 U.S. at 32; *Roadway Express*, 447 U.S. at 752; *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575

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[7] *See, e.g.*, Kelly Lucas, *$140 Million Award Overturned: Deception by Plaintiff's Expert Led Judge to Rule Verdict Was Product of Unfair Proceedings*, THE INDIANA LAWYER, Feb. 27, 2002, at 1; Terry Horne, *$140 Million Jury Award to Guidant Is Set Aside: Federal Judge Questions Impartiality of Expert Witness; Appeal Expected*, THE INDIANAPOLIS STAR, Feb. 15, 2002, at B1; *Judgment Against St. Jude Overturned: Professor Said He Hadn't Been Expert Witness*, MINNEAPOLIS STAR-TRIB., Feb. 15, 2002, at D1.

(1946) (inherent power to conduct an investigation, *sua sponte*, into whether fraud on the court has occurred); *Hazel-Atlas*, 322 U.S. 238 (1944); *see also Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962) (inherent authority to dismiss for lack of prosecution); *Illinois v. Allen*, 397 U.S. 337 (1970) (inherent authority to bar a disruptive criminal defendant from the courtroom). Because inherent powers are not derived from statute or rule, this Court has repeatedly recognized the importance of delineating the circumstances in which they can be exercised. Importantly, this Court's attention has frequently been directed at correcting circuit courts when they determine that a district court *lacked* inherent authority. *See Roadway Express*, 447 U.S. at 756-57; *Hazel-Atlas*, 322 U.S. at 246-47. A correct resolution of the question presented by this case is as essential to the proper administration of justice in the federal courts as were any of the questions presented in this Court's prior inherent powers cases.

2. Review is particularly warranted because this case involves fraud in the patent process. A patent is a "special privilege designed to serve the public purpose of promoting 'Progress of Science and useful Arts,'" which gives the public "a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct." *Precision Instrument Mfg. Co. v. Automotive Maint. Mach.*, 324 U.S. 806, 816 (1945); *see also Hazel-Atlas*, 322 U.S. at 246 ("[t]here are issues of great moment to the public in a patent suit").

The first ruling of patent validity is afforded almost unassailable preclusive effect. *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 332-33 (1971); *see* 6 DONALD S. CHISUM, CHISUM ON PATENTS § 19.02[2][e], at 19-71 to 19-73 & n.61 (2000). Indeed, the patent system is predicated on the principle that the public should have "one full and fair opportunity to have the validity issue adjudicated correctly." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 102 (1993). Because of CPI's fraudulence, St. Jude—and the public at large—have never

received a full and fair hearing on the obviousness defense presented by St. Jude at trial. Yet the decision below "reinstates" the jury's verdict rejecting that defense, notwithstanding CPI's fraudulent concealment of evidence contradicting that verdict. If that decision stands, CPI will have successfully perpetrated a fraud not just on the district court and St. Jude, but also on the public and the system of justice.

This Court has consistently encouraged courts to measure claims of fraud in the patent process against "both public and private standards of equity" (*Precision Instrument*, 324 U.S. at 816), and to exercise their inherent power to prevent any "scheme[s] which involve[] a misuse of the patent privilege" or any "conspiracy to expand a patent beyond its legitimate scope." *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 670 (1944). These were the very considerations that prompted the Court in *Hazel-Atlas* to vacate the judgment at issue in that case. App., *infra*, 152a; *see also Precision Instrument*, 324 U.S. at 820 (dismissing infringement claim filed by a plaintiff who knew that the original patent had been procured by fraud).[8]

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[8] Academics and legal commentators also have emphasized that a patent is an important public right that must be protected against fraud and other deceptive practices. *See, e.g.*, Lawrence Schlam, *Compulsory Royalty-Free Licensing as an Antitrust Remedy for Patent Fraud: Law, Policy and the Patent-Antitrust Interface Revisited*, 7 CORNELL J.L. PUB. POL'Y 467 (1998) (suggesting that patentees who engage in fraud in prosecution should be forced to offer royalty-free licenses to victims); Steven Fasman, *The Proper Application of Civil RICO to Patent Fraud*, 96 YALE L.J. 1323 (1987) (considering whether victims of patent fraud should be able to recover treble damages); Edwin S. Flores & Sanford E. Warren, Jr., *Inequitable Conduct, Fraud, and Your License to Practice Before the United States Patent and Trademark Office*, 8 TEX. INTELL. PROP. L.J. 299 (2000) (considering remedies to deter fraud in patent prosecution).

In sharp contrast to the principles laid down by this Court's precedents, the decision below allows CPI to profit from its own perfidy. Although CPI perpetrated a massive fraud on St. Jude, the jury, and the district court, the Federal Circuit's decision preserves CPI's ability to contend that it has a valid claim to the '288 patent, without even the test of a fair hearing. CPI's deliberate attempt to manipulate the patent system should not go unpunished.

Where, as here, the Federal Circuit has acted on a matter within its exclusive jurisdiction, this Court has not hesitated to grant review to supervise the Federal Circuit's administration of the law. The Court cannot simply wait for legal issues pertaining to patents to percolate among the courts of appeals because only one court of appeals hears such cases. This Court has frequently granted review of cases within the Federal Circuit's exclusive jurisdiction over patent claims, recognizing that a conflict among the circuits may never arise, where the Federal Circuit has departed from the accepted course.[9] Under such circumstances, this Court has

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[9] *See, e.g., Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002) (examining whether a patentee can be prevented from asserting the doctrine of equivalents through prosecution history estoppel); *Dickinson v. Zurko*, 527 U.S. 150 (1999) (reversing the Federal Circuit's standard of review over determinations of the Patent and Trademark Office); *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55 (1998) (granting certiorari to determine when an invention becomes "on sale" and thus incapable to being patented after one year has passed under Section 102(b) of the Patent Act of 1952); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) (granting review to determine whether the Seventh Amendment requires the jury to decide questions of patent claim construction); *see also Hercules, Inc. v. United States*, 516 U.S. 417 (1996) (resolving whether government contractor could recover tort judgments incurred in the course of performing the contract from the government); *Keene Corp.*

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focused on the importance of the issue at stake in the case in determining whether review is warranted. *See* ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE § 4.21, at 264-65 (8th ed. 2002).

The Federal Circuit's decision in this case reflects a reckless disregard of the importance of preserving and safeguarding the integrity of trial proceedings in the federal courts. Review is necessary to avoid condoning misconduct in patent litigation; to prevent a litigant from profiting from deception practiced by its witness, attorneys, and a company officer to protect St. Jude's fair trial rights; to uphold the district court's prerogative to control proceedings in its courtroom; and to preserve the public's interest in an untainted determination of patent validity. Any other result would allow an adjudicated fraud on the court to go unredressed, which would constitute a travesty of justice.

[Footnote continued from previous page]

v. United States, 508 U.S. 200, 205-06 (1993) (granting certiorari to interpret 28 U.S.C. § 1500, which exclusively concerns the jurisdiction of the Court of Federal Claims).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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